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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 481

MACARTHUR MINING COMPANY, INC., PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Western District of Missouri (R. 37-42; 45-51; 450-453), are reported at 82 F. Supp. 455 and 87 F. Supp. 211. The opinion of the Court of Appeals for the Eighth Circuit (R. 493-502) is reported at 184 F. 2d 913.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1950 (R. 502). A petition

for rehearing was denied on December 5, 1950 (R. 533). The petition for a writ of certiorari was filed on January 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the administrative denial of petitioner's claim for additional zinc and lead subsidy payments constituted the issuance of an order under Section 2(e) of the Emergency Price Control Act of 1942, reviewable only in the Emergency Court of Appeals.

2. Only if the preceding question be answered in the negative need the following additional questions be considered:

   a. Whether the Roosevelt-Nelson letters constituted a contractual commitment to petitioner.

   b. Whether this action is, in substance, a suit against the United States to which it has not consented.

3. Whether respondent's appeal to the court below was timely.

STATUTES INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set forth in the Appendix, *infra,* pp. 34-36.

STATEMENT

This is a suit to recover subsidy payments under the Premium Price Plan which were allegedly

withheld from petitioner by the "unwarranted and capricious" action of those administering the Plan (R. 3). The facts, as they appear in the transcript and the official records of the emergency subsidy program, are as follows:

1. *Premium Price Plan.*[1] The Plan had its origins in the efforts of the Government, early in the defense program prior to World War II, to expand production of copper, lead, and zinc and to maintain price stability in these strategic materials. The problem faced by the Government was that of encouraging production without greatly increasing the general level of metal prices.

Following the outbreak of war in Europe, American metal markets were generally unstable, with sharply fluctuating prices. In 1940 and 1941, efforts were made to achieve price stability by stabilization agreements with the leading zinc, lead and copper operators, and subsequently, maximum price schedules.[2] Price stability, by these means, was soon jeopardized. Intensive production resulted in rapidly increasing costs because of the use of lower grade ores and more costly mining methods. The absence of wage controls resulted in labor cost increases which imposed

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[1] The description of the Premium Price Plan which follows is derived, except where otherwise noted by references to the transcript, from Senate Subcommittee Print No. 8, 79th Cong., 2d Sess., Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business.

[2] See Senate Subcommittte Print No. 8, *supra*, pp. 74-79.

additional pressure on the price ceilings. Accordingly, measures were proposed by the various Government agencies concerned to minimize the impact of these cost increases upon the price level but at the same time stimulate the production of low-grade ores, the operation of submarginal properties and the development of additional ore reserves. The Emergency Price Control Act, which, in Section 2(e) (*infra*, p. 34) authorized subsidy payments to domestic producers so as to obtain maximum necessary production, became law on January 30, 1942. 56 Stat. 23. In February 1942, as a result of conferences between the Office of Price Administration, the Office of Production Management, the Metals Reserve Company, and the Reconstruction Finance Corporation, the Premium Price Plan was finally evolved.

The basic principle of the Plan was the payment by Metals Reserve Company (MRC) of supplemental subsidies or premiums above the ceiling prices for copper, lead, and zinc produced in excess of specified production quotas. Although it was originally planned that MRC would purchase such premium metal and dispose of it at ceiling prices, the Plan as put into operation took the form of a subsidy payment to the operator, representing the difference between the ceiling price and the premium price, with the metal itself going through the normal trade channels. (R. 168-169.)

As initiated, the Plan provided for the assignment of quotas to each mine based on the 1941

production of the mine under consideration. The quota was to represent the maximum production that might reasonably have been expected during 1941 with existing facilities and labor, had these been used to full capacity. Zero quotas were assigned to mines which produced 200 tons or less during 1941, intermediate quotas between zero and 100 percent were assigned to mines which produced more than 200 but less than 600 tons in 1941, and 100 percent quotas were assigned, with certain exceptions, to mines which produced 600 tons or more in 1941. Production in excess of these quotas would entitle the operator to premium subsidy payments from MRC.[3]

With the approval of the President, who was authorized under Section 201(b) of the Price Control Act (50 U.S.C. App. 921(b)) to transfer functions thereunder to various agencies, the administration of the plan was delegated by the Federal Loan Administrator to the War Produc-

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[3] In late 1942, the Plan was modified to provide for greater premium payments to certain high-cost mines. Under this modification, the basic quotas were supplemented by additional quotas. Thus, a mine with a basic quota of 2,000 tons of zinc a year might be assigned a second quota of 3,000 tons ("B" quota) and a third quota of 5,000 tons ("C" quota). The position of such a mine if it produced a total of 6,000 tons would be as follows (R. 168):

1. First 2,000 tons paid for at 8.25¢ per pound by smelter, no premium.
2. Next 1,000 tons paid for at 8.25¢ per pound by smelter, plus premium of 2.75¢.
3. Next 2,000 tons paid for at 8.25¢ per pound by smelter, plus premium of 5.50¢.
4. Next 1,000 tons paid for at 8.25¢ per pound by smelter, plus premium of 8.25¢.

tion Board (WPB), the Office of Price Administration (OPA), and MRC.[4] Quotas were set, upon recommendation of a Quota Committee composed of representatives of OPA and WPB, by the approval of Reviewing Officers of OPA, WPB, and MRC. The "* * * principal function [of MRC] under the plan was to make the subsidy disbursements." (R. 167).[5] Quotas were based in part upon the operator's cost and production estimates, which were studied by the Quota Committee, the Reviewing Officers, and their staffs, and fitted, by the exercise of appropriate judgment, into the standards of the Plan.[6]

As administered, the Plan was in no sense a cost-plus-percentage-of-cost or cost-plus-fixed-fee plan. Quotas were calculated and fixed upon a forecast basis so as to cover anticipated costs and a reasonable profit margin. Whether a particular operator received the calculated margin of profit, exceeded that margin, recovered less than the margin, or even sustained a loss, depended upon the relationship of the actual tonnage produced by the operator and the costs of production to the estimated tonnage and costs. (R. 260-262, 270-274, 283-296.) Generally, operation under the Plan

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[4] Senate Subcommittee Print No. 8, *supra*, p. 223.

[5] On June 30, 1945, the functions and liabilities of MRC were transferred to respondent. 59 Stat. 310.

[6] The process by which quotas were fixed is graphically illustrated by a "flow sheet" which appears at p. 98 of Senate Subcommittee Print No. 8, *supra*.

did not result in the realization of the exact margin used in the calculation of the quota. In some cases, the operator earned a larger return than was intended; in others, his margin was less; and in still others, he sustained a loss. (R. 261.)

Where the return under a quota was much above what the Quota Committee considered adequate, quotas were adjusted to lower the subsidy paid. If the quota yielded an inadequate margin of profit, the Committee, on application of the operator, revised the quota downward so as to yield a higher margin. In both cases, the adjustment was prospective only and made no allowances for the recoupment of excessive profits or the reimbursement of past losses. (R. 261, 274-275.)[7] Quotas were subject to revision retroactively only to correct arithmetical errors of the Committee or to take into account wage increases approved by the War Labor Board (R. 15-16).

This Plan continued in effect from February 1, 1942 to July 31, 1945. By amendments to Section 2(e) of the Emergency Price Control Act, Congress further extended the operation of the Plan to June 30, 1947 (59 Stat. 260, 261; 60 Stat. 664, 671). At that time, the WPB and OPA "functions with respect to premium payments under Section 2(e) (a) (2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores," were vested

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[7] See Senate Subcommittee Print No. 8, *supra*, pp. 148-149.

in the Secretary of Commerce. Executive Order 9841, 12 F.R. 2645, par. 302(b).

On April 17, 1943, while the Plan was operating as described above, Donald M. Nelson, Chairman of WPB, wrote to the President describing national policies as to the production of critical metals and minerals. (R. 6-13). In pertinent part, the letter advised the President that (R. 9-10):

> 5. It is national policy that labor materials, transportation, and time to get into production, rather than money cost, are to be considered the controlling factors in deciding whether or not to increase production, but that the price paid shall bear a reasonable relation to the costs of production and the earning of a fair return over the costs of each separate producer.
>
> Comment.—In any particular project output of product per unit of labor, expenditure of materials and equipment per unit of output, availability and reliability of transportation, time required to secure a usable product are all factors of more importance than money cost. To some extent of course, money cost is a shorthand way of expressing manpower and materials requirements, but we should always look primarily at these factors directly; that is, manpower and material requirements.
>
> By using the phrase 'money cost' I am seeking to emphasize the fact that in this war money must be regarded as a means to an

> end, and not as a measure of the value of that end. The ends we have in mind—complete and speedy victory—are to be measured only in terms of the lives of our fighting men and the security of the Nation.
>
> But I also must make clear that so far as price to any particular producer is concerned, it is a governing principle that the price paid bears a reasonable relation to the costs of production and the earning of a fair return over the costs of each separate producer.

This statement of policy was approved by the President and made public by him in a letter to Senator James E. Murray, dated April 24, 1943 (R. 13).[8]

2. *Petitioner's Claim for Additional Premiums.* Petitioner is a Kansas corporation which, from 1942 to June 30, 1947,[9] engaged in zinc and lead mining operations in Missouri, within the Tri-State Mining Area (R 1, 30, 117). These operations were of a submarginal type made possible by the subsidies payable to petitioner under the

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[8] The full text of the President's letter reads as follows (R. 13):

> This is in further reply to your letter of February 19, raising questions concerning our national policy with respect to the production of strategic and critical metals and minerals. Mr. Donald M. Nelson, Chairman of the War Production Board, has submitted the policies set forth in the letter attached with the recommendation that I approve them and make them public. I do approve these policies, and I am making them public in this letter to you.

[9] Petitioner continued mining after June 30, 1947, the terminal date of the Premium Price Plan. (*Supra*, p. 7.)

Premium Price Plan. Petitioner's initial capital was the lease of the mining property, which required no capital outlay on its part but for which petitioner agreed to pay a royalty out of income. (R. 115-116.) The stockholders and officers of petitioner made no capital contribution or investment whatsoever in petitioner (R. 116-117). Mining operations were begun with loans totalling $125,000, received in 1942 from respondent, which loans were not a part of, or made under, the Plan (R. 120, 282). Additional costs were paid out of income (R. 74).

During the years 1943 and 1944, the period for which additional subsidies are here asked, petitioner's profits, as shown in its profit and loss statements, were as follows: In 1943, when petitioner was still in the initial phases of its operations, it had a net operating profit of $32,496.71, but a net loss of $24,730.71 after deducting for depreciation and depletion (Pet. Ex. 5, R. 331); in 1944, petitioner had a net operating profit of $79,868.66, which, after setting aside reserves for depreciation and depletion, left a net profit of $31,732.80 (Pet. Ex. 6, R. 361). The testimony of petitioner's accountant, however, was that petitioner's total loss for 1943 and 1944 was $42,933.19 or "a little over 19¢ per rock ton" (R. 69). The district court found that in these two years, petitioner had a loss of $17,845.52 and was entitled to a "reasonable" net profit of $278,836.25. The total judgment awarded was $296,681.77 (R.

454).[10] Presumably this computation was based on the premise that petitioner's entire borrowed capital should be fully amortized in these two years of operation,[11] and that reserves for depreciation and depletion should be set up before the computation of profit and loss (R. 70, 74) although the lease had cost petitioner nothing and royalty payments on the lease were deducted from gross income in arriving at net operating profit (R. 331, 361).

For the entire period of petitioner's participation in the Plan from 1943 to June 30, 1947, petitioner had an operating profit before depreciation, depletion and Federal taxes, of $387,000 (R.

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[10] Petitioner states that respondent does not "* * * challenge the fact that MacArthur Mining Company not only did not receive a fair margin of profit but in fact lost 19¢ per rock ton mined * * *" (Pet. 8). In fact, respondent's answer denies petitioner's allegation of a loss of 19¢ per rock ton (R. 23, 32), and respondent contested the validity of this allegation during the trial. Further, respondent urged on appeal below that the court's finding as to the loss sustained was clearly erroneous. Moreover, the record shows that, on cross examination, petitioner's accountant and witness testified to a revised loss computation for 1943 and 1944, based on the assumption that petitioner's entire capital investment should first be amortized and allowances made for depreciation and depletion but with an arbitrary salvage value of 20% for petitioner's equipment. The loss as thus recomputed upon an *ad hoc* basis was reduced "to around 10 or 11 cents a ton" (R. 123-125), and at the close of the trial, petitioner amended its complaint to allege a net loss, after allowing reasonable salvage value, of 10½ cents (R. 447). The court appears, although it did not explain its computation, to have allowed a salvage value for petitioner's equipment in the course of its computation. (R. 123-125.)

[11] It is pertinent to note in this regard that repayments to respondent on petitioner's loan started in June, 1944 and were completed in June 1946. (R. 71-72.)

277), or a net profit before taxes, according to petitioner's accountant and witness, of at least $266,425, after paying off its entire capital investment and making allowances for depreciation and depletion in addition to management fees and salaries (R. 312).

At various times during petitioner's participation in the Plan, petitioner's president complained to several Government offices about petitioner's quotas under the Plan (R. 118-119, 143, 145, 159, 178-179, 249, 251, 252, 266). Petitioner first sought lower quotas (R. 145, 159), and petitioner's quotas were revised from time to time (R. 205, 207, 211, 215, 219, 221, 223, 237, 241, 243, 245, 247). As early as November 23, 1943, petitioner was advised by the Quota Committee that (R. 225-226) "* * * If you are unable to secure an adequate margin under the above quota, we will not consider it sufficient cause for recommending a lower quota, and we suggest that in that case you consider the advisability of the transfer of your labor to other mines where it might be used more effectively in the production of war materials."

Subsequent to 1944, petitioner developed the theory that it had a contract with respondent's predecessors assuring petitioner against losses, and further assuring petitioner "a fair margin of profit" on its 1943-1944 operations. (R. 1-3, 14-18).[12] This theory was based upon Mr. Nelson's

[12] The record shows no sign of this theory or claim prior to 1945 (R. 137, 138, 143, 145, 147, 149, 151, 152, 153, 154).

letter to the President in April 1943, *supra,* pp. 8-9, the President's letter to Senator Murray, approving the policies suggested in the Nelson letter, *supra,* p. 9, and petitioner's asserted reliance upon these letters.

This theory was communicated to the Honorable John Caskie Collet, then Director of the Office of Economic Stabilization, who, on December 4, 1945, wrote the Quota Committee a letter suggesting that "Mr. Nelson's letter of April 17, 1943 and the President's approval of it constitutes a commitment to MacArthur that quotas and premiums would be established which would result in a fair margin of profit" (R. 14, 17).

In reply, the Quota Committee pointed out that the Premium Price Plan had been in existence since February 1942, and expressed the belief that Mr. Nelson's letter was not intended, and could not be construed, to change the established basis of the Plan to the contractual or cost-plus theory urged by petitioner (R. 259-262). The Committee noted that (R. 260):

> * * * Only one mine operator has ever suggested to the Quota Committee that Mr. Nelson so intended and that his statement had the legal effect of turning the Premium Price Plan into a guaranteed cost plus system for every mine operator. The Premium Price Plan was administered on the same principles both before and after Mr. Nelson's statement.

> This seems clear evidence that Mr. Nelson's statement was an affirmation of the existing operation of the Plan.

Continuing, the Committee further observed (R. 261-262):

> It would seem that if it had been intended that no operation should receive less than costs plus the standard margin, all quotas should have been calculated after the event by accountants rather than before production by mining engineers. To figure all quotas prospectively and then to recalculate only those where the margin earned has been less than intended would be even more unsatisfactory than a straight cost-plus system.

In conclusion, the Committee expressed its willingness to go into the facts and make its files available in this regard to Judge Collet (R. 262). Thereafter Judge Collet requested the Quota Committee to submit in writing such further statements as properly bore upon the case in order that he might determine whether a hearing should be had (R. 263). Judge Collet, however, appears to have left the Office of Economic Stabilization before taking such further action. Petitioner's quotas were thereafter further reviewed by the Quota Committee and by the Director of the Office of Economic Stabilization. On April 10, 1946, the Honorable John W. Snyder, then Director of

the Office of War Mobilization and Reconversion, wrote petitioner that (R. 264-265):

> I have had your case reexamined, and am advised by Mr. Chester Bowles, Director of Office of Economic Stabilization, that on the basis of information available, no retroactive adjustment is warranted in this case. Therefore, unless there is additional data available, they are considering the matter closed.

Mr. Bowles, the new Director of the Office of Economic Stabilization, had advised petitioner on March 28, 1946, that its case had been reexamined "fully and carefully" by the Quota Committee; that the Committee "findings have been exhaustively discussed with members of my staff"; that "On the basis of this review of the facts, I am satisfied that no basis exists for a retroactive revision of the quota to the MacArthur Mining Company, and that no exception should be made in this case to the Quota Committee's well-established rule against retroactive quota revisions"; and that "this Office considers the matter closed." (R. 189).

Petitioner then requested Mr. Bowles to withdraw his letter of March 28, 1946 (R. 266). In reply, Mr. Bowles informed petitioner on April 23, 1946, that he had fully considered Judge Collet's letter; that that letter made no final disposition of the question; that the case had been reexamined and reconsidered on "the facts which Judge Collet requested"; and that "I believe the

Quota Committee's decision to be right."[13] (R. 266-267). After the transfer of the administration of the Premium Price Plan to the Department of Commerce (*supra,* pp. 7-8), petitioner's contentions and quotas were fully analyzed by the Department of Commerce and the previous refusal to allow additional subsidy payments was reaffirmed (R. 177-178).

3. *Proceedings below.*—This suit was filed on January 28, 1948, in the District Court for the Western District of Missouri as a "Petition On Contract" in two counts (R. 1-21).[14] In pertinent part, the complaint alleges that the Nelson-Roosevelt letters constitute a "Presidential Directive" having the "force and effect of law by reason of the War Time Powers granted to the President of the United States by Act of Congress, 50 app. USCA, 601, 631, Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, 15 U.S.C.A. 606b." (R. 2, 30.)

Further, the complaint alleges that (R. 3):

> * * * relying upon said Directive of the President of the United States, it persistently and continuously, orally and in writing, pro-

[13] The Director of Economic Stabilization, under the Stabilization Act of 1942 (50 U.S.C. App. 961) and related Executive Orders, had overriding policy power over all price and stabilization agencies, which were required to adhere to his directives. *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation,* 155 F. 2d 525 (E.C.A.), certiorari denied, 329 U. S. 737.

[14] The district court found the evidence on the second count too vague to enable it to adjudicate in favor of petitioner (R. 452). This count was abandoned by petitioner on appeal.

> tested and maintained that the quotas assigned and allowed to Petitioner for the production of its lead and zinc were entirely inadequate to provide for a fair margin of profit to which Petitioner was entitled to as a matter of right and as a matter of law as provided in the Directive of the President * * * that except for the National Policy of the United States as embodied and declared in the Directive of the President (Exhibits A and B), it would have been compelled to cease operations in April, 1943. However, in reliance upon this National Policy which your Petitioner alleged to be a commitment to and a contract with Petitioner that quotas and premiums would be established and paid which would result in a fair margin of profit, Petitioner continued its operations. * * *

Continuing, the complaint alleges (R. 3):

> * * * that the refusal of the Quota Committee to allow reasonable and fair quotas to Petitioner during the period January, 1943 to December, 1944 which would allow a fair margin of profit was not based upon fact but constituted a series of decisions and actions utterly unauthorized by law and inequitable in nature and which were the product of the unwarranted and capricious action of the members of the Committee and in direct violation of the Directive of the President of the United States and the law of the Land.

After asserting that "no appellate procedure was provided for wit' respect to the decisions of

the Quota Committee and that Petitioner was therefore powerless to appeal from the Quota Committee's unlawful, discriminate, capricious and arbitrary action" (R. 4), petitioner demanded judgment in the sum of $165,621.17 (R. 4).

In answer, respondent denied that the Nelson-Roosevelt letters constituted a contract or a basis of contract; that they had the force and effect of law by reason of 50 U.S.C. App. 601, 631, and Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, (15 U.S.C. 606b); that the Premium Price Plan required the payment to petitioner of a margin of profit, fair or otherwise; and that the actions of the Quota Committee and Reviewing Officers had been arbitrary, capricious, or contrary to law (R. 21-27, 30-34).

By way of further defense, respondent contended that the suit was exclusively within the jurisdiction of the Emergency Court of Appeals under Section 204(d) of the Emergency Price Control Act of 1942, as amended, (50 U.S.C. App. 924(d)); that the complaint failed to state a claim upon which relief could be granted; that the district court lacked jurisdiction because the action was in substance a suit against the United States, which had not waived its immunity from suit or consented to be sued; and that petitioner had not exhausted the administrative remedies prescribed by Section 203 of the Emergency Price Control Act of 1942, as amended, (50 U.S.C. App. 923) (R. 33-34).

On February 11, 1949, after a preliminary hearing on the jurisdictional defenses, the district court refused to dismiss the suit for want of jurisdiction (R. 37-42). The district court later denied respondent's motion for reconsideration and rehearing of the jurisdictional defenses (R. 45-51). After a trial on the merits, the court on November 22, 1949, entered a judgment for petitioner in the sum of $296,681.77, together with costs (R. 455, *supra,* p. 11). The court held " * * * that a contractual arrangement actually existed between the Government, through its corporate arms, and the plaintiff * * * The whole aspect of the case is one showing a contract between the Government and its corporate arms or entities with the plaintiff. * * * The Government (or its corporate arm) is in default because it has not made good its promise to save the plaintiff harmless from loss and to assure it a fair margin of profit" (R. 453).

On January 18, 1950, respondent took an appeal to the court below (R. 456). Petitioner moved to dismiss the appeal on May 3, 1950, as not timely filed within the thirty days required by Rule 73(a) of the Federal Rules of Civil Procedure of parties other than "the United States or an officer or agency thereof," on the ground that respondent is not an agency of the United States within the purview of Rule 73(a). (R. 461-480.) This motion was denied by the court below (R. 491),

renewed by petitioner (R. 491-492), and re-denied by the court of appeals (R. 501-502).

On the significant, jurisdictional phase of the case, the court of appeals ruled that the district "court erred in holding that the Emergency Court of Appeals does not have exclusive jurisdiction of the subject matter of the action" (R. 499). It therefore reversed the judgment of the district court and remanded the case with instructions to dismiss the complaint (R. 502). As an additional ground for denying jurisdiction to the district court, the court of appeals noted that the suit is, in effect, one against the United States to recover more than $10,000, an amount for which the Government has not consented to be sued in the district court (28 U.S.C. 1346(a)(2) (R. 501). As to the merits, the court below pointed out that the Nelson-Roosevelt letters purported only to announce a policy of the Government and were not intended to create private contractual or vested rights (R. 498).

ARGUMENT

The decision of the court below, holding that jurisdiction of this action is in the Emergency Court of Appeals and not in the district court, is, we submit, clearly correct; there is no conflict, and no other ground for review by this Court.

1. Section 204(d) of the Emergency Price Control Act of 1942 (50 U.S.C. App. 924(d), see *infra*, p. 35) vests in the Emergency Court of

Appeals, and in this Court, upon review of the Emergency Court's judgments, "exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 * * * and of any provision of any such regulation, order * * *," and provides that no other court shall have jurisdiction or power "to consider the validity of any such regulation, order * * *." The compelling considerations which motivated that exclusive grant of jurisdiction have been reviewed by this Court, and the constitutionality of the grant affirmed. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

The Emergency Court of Appeals has this exclusive original jurisdiction, as the express language of Section 204(d) shows, not only as to regulations of general applicability, but also with respect to "order[s] issued under Section 2" of the Emergency Price Control Act and directed at particular individuals. *Porter* v. *Eastern Sugar Associates*, 159 F. 2d 299, 301-302 (C. A. 4) and cases there cited; *Woods* v. *Bobbit*, 165 F. 2d 673 (C. A. 4); *Coffey* v. *Smith*, 159 F. 2d 277 (C. A. 7); *Fleming* v. *Phoenix Chair Co.*, 168 F. 2d 3 (C. A. 7); *Noble* v. *Ricker*, 165 F. 2d 283 (C. A. 10). No other court "whether federal, state or territorial [has jurisdiction] to pass upon these questions." *Swift & Co.* v. *Reconstruction Finance Corp.*, 183 F. 2d 456, 459 (C. A. 7), certiorari denied, 340 U. S. 878.

There also is no longer any room for doubt that the denial by respondent of a subsidy or premium claim constitutes the issuance of an individual order. All pertinent decisions so hold, stressing the fact that Reconstruction Finance Corporation's administrative action "relative to the payment or non-payment of a subsidy" is "an order" over which the Emergency Court of Appeals has exclusive jurisdiction. *Tambasco* v. *Reconstruction Finance Corporation*, 178 F. 2d 283, 285 (C. A. 2); *Swift & Co.* v. *Reconstruction Finance Corp.*, 183 F. 2d 456 (C. A. 7), certiorari denied, 340 U. S. 878; *Duncan Coffee Co.* v. *Reconstruction Finance Corporation*, 178 F. 2d 926, 928 (E.C.A.), certiorari denied, 339 U. S. 947; *Merchants Packing Company* v. *Reconstruction Finance Corporation*, 176 F. 2d 908 (E.C.A.); *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation*, 169 F. 2d 419, 420 (E.C.A.), certiorari denied, 335 U. S. 846; *Belle City Packing Company* v. *Reconstruction Finance Corporation*, 169 F. 2d 413, 414 (E.C.A.); *Armour & Co.* v. *Reconstruction Finance Corporation*, 162 F. 2d 918, 923 (E.C.A.); *Greenhouse Bros. & Finkelstein, Inc.* v. *Reconstruction Finance Corporation*, 159 F. 2d 712 (E.C.A.), certiorari denied, 331 U. S. 812; *Illinois Packing Co.* v. *Snyder*, 151 F. 2d 337 (E.C.A.); *Illinois Packing Co.* v. *Bowles*, 147 F. 2d 554 (E.C.A.).

Petitioner apparently does not challenge the exclusive jurisdiction of the Emergency Court of

Appeals over subsidy and premium orders issued under Section 2(e). Nor does it dispute the fact that respondent's administrative action in denying a subsidy or premium claim ordinarily constitutes the issuance of an individual order. Petitioner does, however, endeavor to avoid the jurisdictional limitation imposed by Section 204(d) by arguing that the Premium Price Plan, under which the subsidy payments on the metals here involved were made, "did not function" under Section 2(e) or any other Section of the Emergency Price Control Act (Pet. 21). Authority for these metal subsidies, petitioner contends, is found exclusively in Section 5(d) of the Reconstruction Finance Corporation Act (Pet. 21).

The short and conclusive answer to this contention is that while Section 5(d) authorized respondent to create subsidiary corporations, nothing in that Section authorized payment of subsidies or premiums to compensate producers for low ceilings on their price-controlled products. Indeed, the only express authority for such payments is that contained in Section 2(e) of the Emergency Price Control Act. The terms of Section 2(e), despite petitioner's intimation to the contrary (Pet. 21), show that that section is the sole basis for subsidy payments whether those payments were made by the Price Administrator, by Metals Reserve Company, or by any other Section 5(d) subsidiary of the Reconstruction Finance Corporation. Section 2(e) of

the Price Control Act establishes the criterion that subsidy payments may be made only when it is determined that in the absence of subsidies the necessary maximum production will not be obtained. Section 2(e) also provides that the amounts of the subsidy and the manner and terms upon which they are paid shall be such as are determined to be necessary to obtain the maximum necessary production. As to materials which are not critical nor strategic, Section 2(e) authorizes the Price Administrator to make both of these determinations as well as the actual subsidy or premium payments. With respect to critical or strategic materials, Section 2(e) provides that the determinations are to be made by the Federal Loan Administrator with the approval of the President. And Section 2(e) further provides that the actual subsidy or premium payments for these critical or strategic materials are to be made by corporations created under Section 5(d) of the Reconstruction Finance Corporation Act. This reference, within Section 2(e), to Section 5(d), in no way transplants the basic authority for the subsidy program from the Price Control Act to the Reconstruction Finance Corporation Act. That authority remains where it originated—in Section 2(e). The reference to Section 5(d) does no more than allow the subsidy payments on strategic or critical materials to be made by corporations created under Section 5(d).

The history and operation of the Premium Price Plan (*supra*, pp. 3-9), showing the close interrelationship between the ceiling prices on zinc and lead and the subsidies payable for their production, confirm the need for holding, as did the court below, that "the quotas issued by the Quota Committee of the Premium Price Plan, assailed in this case, were all issued under the authority of Section 2(e) of the Emergency Price Control Act of 1942 as amended." (R. 499.) As that history shows, the need for governmental subsidies or premiums for metals, as well as for other commodities, in order to supplement ceiling prices and thereby assure adequate wartime production, was felt soon after Pearl Harbor. This necessary relationship between subsidies and ceiling prices has been consistently recognized by the courts. *Armour & Co.* v. *Reconstruction Finance Corp.*, 162 F. 2d 918, 922 (E.C.A.); *Ben H. Rosenthal & Co., Inc.* v. *Porter*, 158 F. 2d 171, 172 (E.C.A.), certiorari dismissed on petitioner's motion, 330 U. S. 802; *Armour & Co.* v. *Bowles*, 148 F. 2d 529, 532, 534 (E.C.A.), certiorari denied, 325 U. S. 871; *Earl C. Gibbs, Inc.* v. *Defense Supplies Corp.*, 155 F. 2d 525, 526 (E.C.A.), certiorari denied, 329 U. S. 737; *Illinois Packing Co.* v. *Snyder*, 151 F. 2d 337, 339 (E.C.A.); *Schluderberg-Kurdle Co.* v. *Reconstruction Finance Corporation*, 169 F. 2d 419, 420 (E.C.A.), certiorari denied, 335 U. S. 846; *Rubin et al.* v. *Bowles*, 150 F. 2d 860, 861 (E.C.A.). While the cited

cases relate to subsidies on meat, there can be no doubt that "the premium price plan for copper, lead and zinc" was similarly "closely tied into the price ceiling mechanism." Senate Subcommittee Print No. 8, 79th Cong., 2d sess., Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business, p. III.

Moreover, throughout the operation of the Plan, it was fully recognized not only by those administering the Plan but by the President and Congress as well, that the subsidy payments on zinc and lead were based on Section 2(e) of the Emergency Price Control Act of 1942 rather than on any other legislation. Thus, in a report to Congress by the General Accounting Office on the Metals Reserve Company, it was emphasized that while the Company was created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, "the authority of Section 2(e), Title I of the Emergency Price Control Act of 1942" enabled the Company to pay "cash subsidies to the domestic producers of strategic and critical metals and minerals" (R. 161, 163).[15] That report also focused attention on the fact that "the largest single class of expenditure made by Metals Reserve Company was the payment of direct cash subsidies to producers of strategic minerals and

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[15] H. Doc. 758, 80th Cong., 2d sess., Report on Audit of Reconstruction Finance Corporation and Affiliated Corporations: Metals Reserve Company, pp. 3, 5-6.

metals. These payments were made pursuant to the authority contained in the Emergency Price Control Act of 1942 and subsequent legislation" (R. 163). Similarly, the Chairman of the Reconstruction Finance Corporation pointed out that "all of the wartime subsidies paid by the RFC subsidiaries were functioned [sic] pursuant to the authority contained in Section 2(e), Title I of the Emergency Price Control Act of 1942 and subsequent legislation * * *. The metals subsidy in question was carried out pursuant to the foregoing statutory authorization by Metals Reserve Company, and the various subsidies paid by Defense Supplies Corporation, another RFC subsidiary, on meat, flour, butter, etc., were similarly handled. All these subsidies rested on the same legal basis." (R. 172-173.) The Chairman of the Quota Committee which administered the Premium Price Plan also testified that the "statutory basis" for the premium price plan "was Section 2 of the Price Control Act of 1942 as amended" (R. 293, 269). The fact that Section 2(e) of the Price Control Act, rather than Section 5(d) of the Reconstruction Finance Corporation Act, provided the statutory basis for making these metal subsidy or premium payments was reiterated in Congress as early as June, 1943, where Senator Murdock observed that "if subsection (e) of Section 2 should be repealed it would destroy their [i.e., Metals Reserve Company's] subsidy programs as to copper, lead and zinc because those programs

are predicated on that section." 89 Cong. Rec. 6404. And it is significant that in 1945, and again in 1946, Congress, in order to avoid termination of the Premium Price Plan, amended Section 2(e) of the Emergency Price Control Act and not Section 5(d) of the Reconstruction Finance Corporation Act, so as to extend the life of the Plan and the authority to make metal subsidy payments thereunder (59 Stat. 260, 261; 60 Stat. 664, 671; *supra,* p. 7). Finally, the President, in 1947, in transferring to the Department of Commerce certain "functions with respect to premium payments" made it again clear that these subsidy payments were made under the Emergency Price Control Act of 1942, as amended, "insofar as such payments relate to copper, lead, and zinc ores." Executive Order 9841, 12 F. R. 2645, par. 302(b).

These considerations, we submit, demonstrate that the authority for payment of metal subsidies here involved is based only on Section 2(e) of the Emergency Price Control Act. Accordingly, since an order relative to the payment or non-payment of such a subsidy is therefore an order under Section 2(e), the Emergency Court of Appeals alone, under Section 204(d) of the Act (*infra,* p. 35), has jurisdiction to entertain an attack upon it.

2. Since the court below correctly decided that the Emergency Court of Appeals has exclusive jurisdiction over the instant action, there is no

need to reach any of the other contentions raised by petitioner with respect to its claim against the respondent. However, we believe, for the reasons set forth briefly below, that all of those contentions lack merit.

a. Petitioner urges that the general policy declarations set forth in the Roosevelt-Nelson letters (*supra*, pp. 8-9) constituted a contractual commitment guaranteeing subsidies which would permit it to recover a fair margin of profit on its mining. It seems sufficient to point out here that while metal subsidies compensated the mining companies by enabling them to receive a greater price for their metals than that prescribed by the applicable price regulations, claims for subsidy payments, through the long history of subsidy litigation, have never been denominated contract or property rights. Nor would such a holding, we submit, be consistent with this Court's constant rejection of other attempts to fashion contractual rights out of other policy declarations. See *Dodge* v. *Board of Education*, 302 U. S. 74; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 122-124; *Maricopa County* v. *Valley Bank*, 318 U. S. 357, 362; *United States* v. *Teller*, 107 U. S. 64, 68; *Pennie* v. *Reis*, 132 U. S. 464; *Frisbie* v. *United States*, 157 U. S. 160, 166. As stated by the court below, "a government 'policy' does not give rise to a contract in and of itself. The announced policy does no more than to authorize the appropriate

government agency to enter into a contract consistent with the policy" (R. 499).[16]

b. Petitioner, assuming the existence of a contract, also contends that the statement by the court below to the effect that the action is an unconsented suit against the United States, conflicts with *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. But that case stands for the proposition that a corporate subsidiary of Reconstruction Finance Corporation, like its parent, is subject to suit on an action arising out of a contract, which "in due

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[16] The introduction into Congress of several bills designed to grant relief to mining companies in petitioner's position evidences a realization on the part of the mining industry that no contractual commitments were intended by the governmental policy announcements, and the Congressional reports reflect a similar understanding. H.R. 5192, 80th Cong., 2d Sess.; H.R. 834, 81st Cong., 1st Sess.; H.R. 8883, 81st Cong., 2d Sess. An essential purpose of these bills was to grant relief to claimants "who did not have a contract." 95 Cong. Rec. 7039; see House Report 202, 81st Cong., 1st Sess., on H.R. 834, p. 3; see also Veto Message on H.R. 834, H. Doc. No. 253, 81st Cong., 1st Sess., p. 3. It is also appropriate to note here that none of these bills, introduced at the request of the mining industry, would go so far as to authorize recovery of profits on production as claimed by petitioner in the instant case, but would allow recovery only of actual loss sustained in mining operations. The bills were directed towards allowing relief to "men * * * who * * * lost their life savings" by engaging in mining operations as a result of solicitation by official representatives. 95 Cong. Rec. 7039. In addition, H.R. 8883 would allow relief only where the mining companies expended monies with the knowledge on the part of the Government and where the Government had "not, prior to the time those expenditures were made * * * discourage[d] * * * such claimant to proceed." H. Rept. 2539, 81st Cong., 2d Sess., on H.R. 8883, p. 2. As noted in the statement, petitioner, as early as November 23, 1943, was expressly discouraged from further mining operations if the premiums which were being paid to him were felt by him to be insufficient. See *supra*, p. 12.

exercise of its powers, [it had] entered into." 306 U. S. 381, 387. Here, however, if any contract was created, we think it clear that such contract was with the Government and not with respondent's predecessor and subsidiary, Metals Reserve Company. The alleged contract was made by the President, on behalf of the United States, and not by Metals Reserve Company,[17] which was merely a fiscal agent for the payment of monies as directed by those charged with the administration of the Premium Price Plan. The history of the Premium Price Plan and petitioner's claim for additional premiums reveals plainly that the subject matter of this suit is not simply a claim against MRC for failure to make payments which were owing petitioner but a claim that the Government, acting through its various agencies, breached its contract by "capriciously and arbitrarily" refusing to fix quotas which would ensure petitioner subsidies large enough to net it a fair margin of profit. Thus, the breach of contract, if any, was committed not by MRC alone but also by OPA, WPB, the Director of Economic Stabilization, the Director of the Office of War Mobilization and Reconversion, the Federal Loan Administrator, and the Department of Commerce (see *supra*, pp. 5-8; 13-16). In the cir-

[17] It is significant in this connection that petitioner, in urging that a contract exists, formulates the issue as follows (Pet. 16): "Did the President of the United States under Congressional War Power Acts have the right to make a binding and legal offer to an industry for the production of critical metals?"

cumstances, the suit is against the United States and not against respondent or any of its subsidiaries. Accordingly, the *Keifer* case, as stated by the court below, is not "in point" (R. 501).[18]

3. Petitioner further urges that the court below thrice erred in denying, as "without merit" (R. 502), petitioner's motion to dismiss the appeal as not timely taken by respondent under Rule 73(a) of the Federal Rules of Civil Procedure.[19] We submit that petitioner's argument on this score is also without substance. Sections 451 and 2107 of Title 28, United States Code, which became effective subsequent to the promulgation of Rule 73(a),[20] clearly and imperatively extend to respondent the sixty day period for filing a notice of appeal. 28 U. S. C. 2107 provides that "in any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry," and 28 U. S. C. 451 defines an "agency" as "* * * any corporation in

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[18] Similarly, the decision below does not conflict with the later opinion of the court below in *R. F. C.* v. *Childress*, No. 14,094, Dec. 12, 1950 (Pet. 14-15), which was simply a suit *by* R. F. C., not against R. F. C., to reform an indenture because of the clerical mistake of one of R. F. C.'s employees.

[19] After its motion had twice been denied (*supra*, pp. 19-20), petitioner again renewed the motion on petition for rehearing (R. 503).

[20] Rule 73(a) was amended subsequent to the revision of Title 28, United States Code, solely for the purpose of deleting the word "circuit" from the phrase "circuit court of appeals." See H. Doc. No. 33, 81st Cong., 1st Sess., pp. 31-32. Cf. 28 U. S. C. 43(a).

which the United States has a proprietary interest * * *." (See R. 481-486).

CONCLUSION

The decision below is correct and there exists no conflict. It is respectfully submitted, therefore, that the petition for certiorari should be denied.

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APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U. S. C. App. 901 *et seq.*) provide as follows:

1. Sec. 2(e); 50 U. S. C. App. 902(e):

Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought

or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d * * *.

2. Sec. 204(d); 50 U. S. C. App. 924(d):

Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, Title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of